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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7

8 JASON LOPEZ,

9 Plaintiff,

10 v.

11 WINCO HOLDINGS, INC., et al.,

12 Defendants.

Case No. [19-cv-05727-CRB](#)**ORDER GRANTING SUMMARY
JUDGMENT**

13 Plaintiff Jason Lopez brought suit against his former employer, WinCo Foods,¹ in
14 connection with his termination. See Compl. (dkt. 1). WinCo now moves for summary judgment
15 on all of Mr. Lopez's claims. See MSJ (dkt. 39). Because there is no genuine dispute as to any
16 material fact and WinCo is entitled to judgment as a matter of law, the Court grants WinCo's
17 motion. See Fed. R. Civ. P. 56(a).

I. BACKGROUND**A. Lopez's Employment History****1. Early Employment**

21 Mr. Lopez began his employment with WinCo in 1994 as a cart clerk at its grocery store in
22 Reno, Nevada. Lopez Depo. (dkt. 39-2) at 15:23–25. He worked in a variety of positions at a
23 variety of WinCo grocery stores—the last two decades of which were all in Northern California.
24 Id. at 16:1–21:5. In July 2012, he was promoted to store manager. Id. at 21:6–7; 33:13–15;
25 34:20–25.

26 In July 2015, Mr. Lopez transferred to a WinCo store in Pittsburg, California. Id. at

27
28 ¹ Defendants are WinCo Holdings, Inc. and WinCo Foods, LLC. For ease of reference, this order
refers to both as "WinCo."

1 45:11–23. Over the three-and-a-half years that Mr. Lopez worked at that store, he was threatened
2 and assaulted multiple times by customers and shoplifters. Id. at 50:20–53:20. He became afraid
3 and dreaded going to work. Id. at 53:5–6. Mr. Lopez was one of the top three managers in the
4 region in 2017. Lopez Decl. (dkt. 45-2) ¶ 2. Although Mr. Lopez contends that he always
5 performed his job well, he “started to kind of develop depression” around early 2017. Lopez
6 Depo. at 58:8–25. There is no indication that he informed anyone at WinCo about his depression
7 at the time.

8 **2. January 2018 Incident at Pittsburg Store**

9 In January 2018, Senior VP of Retail Operations Nancy Lebold and VP of Food Safety
10 Kim Lamborn visited the Pittsburg store and “found unacceptable and intolerable store
11 conditions.” Lopez Depo. Ex. 6. Among the conditions that they noted in a January 31, 2018
12 written warning to Mr. Lopez were:

13 **Grocery**

- 14 • There were no useable carts in the lobby.
- 15 • The wall was decimated with several empty items and lots of cardboard.
- 16 • There were a lot of holes down the grocery aisles, not all of these were explainable
from warehouse out of stocks.
- 17 • The dairy cooler was dirty.
- 18 • There were many holes in the dairy doors. Product had not been pushed forward,
which makes it difficult for customers to reach items.

19 **Variety**

- 20 • Variety sections throughout the store were empty, low or in total disarray.
- 21 • The front check stands were cluttered in places and empty in other places.
- 22 • The promo section as empty and/or low. The variety backroom was unorganized
and in disarray.

23 Additionally, there were numerous concerns throughout the perimeter departments:

24 **Bakery:**

- 25 • Many products were low.

26 **Produce**

- 27 • Overall poor conditions throughout the department.
- 28 • Many products were low.
- 29 • There was plunder throughout the department.
- 30 • The bin of bagged potatoes was empty.
- 31 • There was moldy fruit on display.
- 32 • There were numerous empty roll bags in the department.
- 33 • The produce floor and wet rack were dirty,
- 34 • There was a cart full of produce go backs abandoned in common area. This product
had come up to ambient temperature.

Deli

- The department was low on many products.
- There were also many issues surrounding food safety and sanitation in the deli:
- Ingredients were stored in the production room. These ingredients had to be destroyed since they were not stored in an area that was 41° F or less.
 - Items were found that were not dated and/or the dating method used was not consistent.
 - The seafood preparation sink held a plastic bin filled with frozen [fish] that was being slacked out at ambient temperature.
 - There was a large stack of soiled towels that was leaning up against the wall next to the ware washing sink. The soiled towels were over 2 feet tall and spilled over onto the floor. This was in direct sight of customers.
 - The reach in cooler contained broken colanders, many clear lids, and miscellaneous tools, along with undated product.
 - There was a large stack of soiled tools and containers on the are washing sink. The water in the sink appeared to be dirty with a large amount of organic material floating.
 - The floor was heavily soiled with miscellaneous pieces of paper thrown about.
 - In the poultry cooler, the breading tote and rolling cart was heavily soiled. The tote was empty of product, however it was completely layered with a buildup of product. The hanging aprons were heavily soiled. Numerous dirty brooms and miscellaneous cleaning tools were stored in the cooler in close proximity to product.
 - There was fully cooked popcorn chicken stored in the raw poultry cooler.

Id.

The warning explained that as a store manager, Mr. Lopez was “expected to walk the sales floor . . . on a regular basis to [assess] store conditions and then develop a plan to remedy any issues” and that “[i]t was obvious that you had not completely walked the store in its entirety to ensure each department was up to Company standards.” Id. The warning further stated that Mr. Lopez was “expected to walk the store at the beginning of [his] shift and throughout the day.” Id. And it cautioned Mr. Lopez that “[f]ailure to meet minimum standards and expectations moving forward and/or further violation of any company policy will result in further progressive disciplinary action up to and including your immediate discharge of your at-will employment.”

Id.

Mr. Lopez believed that the warning was not warranted. Lopez Depo. at 85:17–22. He recalled that it had been “an incredibly busy day there.” Id. at 63:24–64:7. While he agreed that “[w]e had a bad day,” he also felt that “some of the things” on the warning were not true, and that he had asked for help on some of the things in the warning, specifically the theft of shopping carts.

Id. at 85:23–86:11.

3. Leaving Pittsburgh

a. Transfer Request

On December 10, 2018, shortly after a knife altercation with a shoplifter, Mr. Lopez sent an email to his District Manager, Pete Miller, Director of Human Resources JoAnn Pingree, and LeBold. Lopez Depo. Ex. 7. He explained that the Pittsburg store “sucks the life out of you,” and that he had “become more irritable, angry, disconnected from [his] family and basically depressed than [he] thought possible.” Id. He mentioned having “thoughts of self harm and hopelessness instead of item movement and sales.” Id. He continued: “This brings me to the main reason for my email. When the opportunity comes up, I’d like to request a lateral transfer to Northern Nevada.” Id. He described some of his families’ negative experiences with the Pittsburg area, and urged:

I know there's no guarantees or promises in this business. I know I'm skating on thin ice as it is with the struggles we've had at [the Pittsburg store], and I know I'd be lucky to have a job with WinCo still if an opening does come up. I know it could be a long time until a spot opens up again if ever. I would just ask that you please heavily consider me if a spot does open. . . . I also don't want to have to leave the company that I have been at for 24 years.

Id. He added that he was “not a danger to myself or others” but “may ask for an afternoon off occasionally to try to see a counselor in hopes that I can make my personal life better despite my professional life.” Id.

The following day,² Ms. Pingree went to the Pittsburg store to meet with Mr. Lopez. Lopez Depo. at 92:16–22. She “express[ed] her concern about” his email, and filled out a workers’ compensation form with him. *Id.* at 93:2–5. Ms. Pingree also discussed the transfer request with Mr. Lopez. *Id.* at 114:3–7. She asked him where he wanted to transfer, and he said that he preferred the Reno area. *Id.* at 114:9–12. He explained that his wife was considering moving back to the Reno area and that his daughter was receiving treatment in Reno. Tambling Decl. Ex. A (Lopez Depo) at 105:2–14. There were only two stores in the Reno area at the time,

² WinCo and Mr. Lopez agree that this was the next day, see MSJ at 5 (“[t]he very next day”); Opp’n at 5 (“December 11, 2018 meeting”), but the cited deposition testimony does not say when the meeting occurred.

1 and though Mr. Lopez understood that “WinCo wouldn’t be able to just transfer [him] to one of
2 those locations without transferring somebody else out,” he thought “[p]erhaps one of those
3 managers had been asking to transfer somewhere else too. Maybe they could work it in.” Id. at
4 114:13–115:19. There is only one store manager per location. Id. at 116:3–7.

5 Mr. Lopez also told Ms. Pingree that he would be open to transferring to the Roseville,
6 Folsom, or Tracy stores. Tambling Decl. Ex. A (Lopez Depo.) at 116:9–16. His goal was “to get
7 out of that Pittsburg store and hopefully move to an area where [he] had a larger support network.”
8 Id. at 104: 22–105:1. Roseville and Folsom “were next closest to northern Nevada” and Tracy
9 was close to where he was currently living, near the Pittsburg store. Id. at 116:17–117:2. He later
10 testified that he wanted “to get out of Pittsburg without being put into a similar situation.” Id. at
11 117:9–10.

12 There were no openings at the time. Miller Depo. (dkt. 39-3) at 60:19–61:6 (“There were
13 no openings, so I suppose I wouldn’t look. I mean, I know . . . my stores have a manager.”),
14 82:23–83:1 (neither Reno store had openings). WinCo did not transfer Mr. Lopez immediately;
15 nor did Mr. Miller recall asking other store managers if they would transfer stores to accommodate
16 Mr. Lopez. Tambling Decl. Ex. C (Miller Depo.) at 81:13–82:13. In addition, while Ms. Pingree
17 agrees that “transfer to a different store can be a form of accommodation,” Tambling Decl. Ex. F
18 (Pingree Depo.) at 175:13–15, she did not give Mr. Lopez any reasonable accommodation
19 paperwork at the time of their conversation, id. at 174:1–9. She believed that he had access to
20 such paperwork “because he used [it] on a frequent basis at his store level with his store-level
21 employees.” Id. at 174:4–6.

22 On December 13, 2018, Mr. Lopez sent Ms. Pingree a doctor’s note diagnosing him with
23 Acute Stress Disorder. Tambling Decl. Ex. G (12/12/18 doctor’s note), Ex. F. (Pingree Depo.) at
24 119:16–120:6. The note indicates that Mr. Lopez was able to work “regular duty,” and does not
25 recommend anything relating to a transfer. Supp. Pingree Decl. ¶ 4, Ex. B; see also Supp. Pingree
26 Decl. ¶ 4 (“I never received any medical documentation from Mr. Lopez indicating that a medical
27 professional recommended that he transfer out of the Pittsburg store.”).

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b. Transfer

In late December, a store manager position opened up in Vacaville, and WinCo offered Mr. Lopez the opportunity to transfer to that store. Miller Depo. at 83:5–10. Mr. Lopez accepted the transfer, hopeful that “there would be less chances that I would be assaulted or get beat up.” Lopez Depo. at 121:16–18. Ms. Pingree “had mentioned it was a challenging store in regards to like human resource issues with employees” but Mr. Lopez had not heard anything else about the Vacaville store. Tambling Decl. Ex. A (Lopez Depo.) at 120:10–23. He began working at the Vacaville store on January 13, 2019. Lopez Depo. at 129:23–24. He does not recall being assaulted while employed there. Id. at 121:21–24.

On January 13, 2019, WinCo filled the vacancy Mr. Lopez left at the Pittsburg store with the store manager from the Tracy store, and filled the vacancy at the Tracy store with an assistant store manager from the Reno store. See Opp’n at 6 (citing Tambling Decl. Ex. B (WinCo Partial Transfer Records) at D001107, D001111).

c. Workers’ Compensation, Counseling

On January 28, 2019, Mr. Lopez stated on his proof of workers’ compensation claim form that he was experiencing depression, anxiety, anger, thoughts of self harm, and withdrawal from family. See Tambling Decl. Ex. I (WC forms), LOPEZ000370–75. Mr. Lopez began seeing a therapist named Dr. Fowle. Id. at LOPEZ000371. He saw Dr. Fowle a total of three or four times. Lopez Depo. at 93:14–24, 112:5–6. One time, in April 2019, when he was in a counseling session with Dr. Fowle, Mr. Miller called to ask him where he was, and Mr. Lopez told him. Tambling Depo. Ex. A (Lopez Depo.) at 123:12–17.

Mr. Lopez states that he had some difficulty getting time off of work to see Dr. Fowle because he had to coordinate with his district manager, Mr. Miller. See Lopez Depo. at 112:7–18. He explained that when a store manager is not able to work, an assistant manager needs to be there, and that he had difficulty at times having coverage to attend his appointments. Id. at 113:1–10; see also Pingree Decl. (dkt. 39-4) at ¶ 5 (“As a Store Manager, when Mr. Lopez required time off work for medical appointments, he merely needed to schedule those appointments for times during the week when one of his two Assistant Managers was able to be present in the store.”).

1 While Mr. Miller did not deny Mr. Lopez's request to take time off, Mr. Lopez states that "there
2 were times when we had to skip sessions because I was not able to make it or at least push those
3 sessions back." Lopez Depo. at 113:6–15. Mr. Lopez did not have any further discussion with
4 Ms. Pingree, Mr. Miller, or Ms. Lebold about getting time off of work to see a counselor "due to
5 the fact that I was seeing the work comp doctor." Id. at 112:1–6; see also Pingree Decl. ¶ 5 ("If
6 for some reason [scheduling an appointment when an Assistant Manager was available] was not
7 possible, Mr. Lopez would merely have needed to contact [Mr. Miller] or me for assistance
8 obtaining coverage for his store during his absence. He never did so."). Nor did Mr. Lopez
9 consider "filing a request for FMLA in order to get intermittent time off to see a counselor"
10 "because of the work comp that was going on at the time." Lopez Depo. at 113:16–20.

11 **4. Incidents at Vacaville Store**

12 Mr. Lopez worked at the Vacaville store for exactly two months. Id. at 129:23–24, 15:13–
13 15. During that time, there were three notable incidents reflecting on his job performance, with
14 increasingly severe disciplinary responses.

15 **a. March 17 and 24, 2019 Incidents**

16 On March 17 and 24, a customer who was the son of a WinCo employee visited the
17 Vacaville store and took photos of the conditions in the produce department. Miller Depo. at
18 109:20–110:1. He sent the photos to Ms. Lebold, who forwarded them to Mr. Miller. Id. at
19 110:18–119:1. The pictures showed empty boxes of fruit on display and bad (rotten) fruit. Id. at
20 113:2–114:3; Miller Depo. Ex. 8.

21 Mr. Miller determined that Mr. Lopez had not been at work on either March 17 or March
22 24, but that as store manager, it was Mr. Lopez's responsibility to train his staff, to ensure that the
23 staff who were on duty were aware of the problems, and to take steps to prevent those problems
24 from recurring. Miller Depo. at 103:10–25. Mr. Miller sent the photos to Mr. Lopez and spoke
25 with him about them over the phone, saying "We've got to get this fixed. This shouldn't be
26 happening." Id. at 114:9–14. Mr. Miller told him "that poor store conditions (such as those found
27 on March 17 and March 24) were unacceptable and that serious consequences would occur if such
28 conditions were to take place again in the future." Id. at 122:15–19. Mr. Lopez talked to an

assistant manager who “made it sound like it wasn’t bad,” but Mr. Lopez stated that he could not disagree with Mr. Miller about the condition of the store as he was not there. Lopez Depo. at 146:7–15.

b. March 26, 2019 Incident

On March 26, 2019, a day when Mr. Lopez was working, Mr. Miller visited the Vacaville store to conduct an inspection. Miller Depo. at 116:7–11. He found that “[t]he condition of the produce department was particularly concerning.” Id. at 117:2–4. There were empty produce bins, and the department had not been properly culled, meaning that bad product had not been removed. Id. at 117:5–13. Numerous items were out of stock. Id. at 117:14–18. “The whole department [was] in complete shambles.” Id. at 131:25; see also Supp. Pingree Decl. (dkt. 46-2) Ex. A (photos taken by Mr. Miller of Vacaville store from March 26). This was “particularly concerning” to Mr. Miller, “since we had recently discussed the importance of you focusing your attention on this critical department.” Miller Depo. Ex. 9. Mr. Miller noted that Mr. Lopez had said at the time that when he walked the store in the morning, he had noticed that the produce department was behind, but he felt that they would get caught up. Id.³ Mr. Miller found it “very disappointing and completely unacceptable that at the time of [the] store visit (approximately noon)[, Mr. Lopez] had failed to return to the [produce] department to check the status of the conditions and ensure the department was ready for our customers.” Id. WinCo expected store managers to walk the store throughout the day, as WinCo had reminded Mr. Lopez in his January 31, 2018 written warning. See Lopez Depo. Ex. 6.

Mr. Lopez stated that he “generally would walk the store and then go back and follow up again” but that that day “was kind of unique” and so he “wasn’t able to circle back around.” Lopez Depo. at 150:9–18. He felt that the day of the inspection was “kind of an outlier more than the norm.” Id. at 150:16–18. Mr. Lopez felt that the produce department had improved dramatically in the couple months that he was there. Id. at 154:8–18.

³ This is somewhat different from Mr. Lopez's deposition testimony, in which he stated that "[i]t was kind of an odd situation or unique situation" because they were remodeling the department at that time. Lopez Depo. at 149:9-17.

c. Suspension

On April 9, 2019, WinCo issued Mr. Lopez a Notice of Disciplinary Suspension, suspending him from work between April 10 and April 16, 2019. See Lopez Depo. Ex. 9. The Suspension Notice detailed Mr. Lopez's January 2018 written warning, his district manager's having reinforced with Mr. Lopez the expectation that he walk the sales floor "on a regular basis to [assess] store conditions and then develop a plan to remedy any issues," his January 13, 2019 transfer, the March 17 and 24, 2019 incidents, and the March 26, 2019 inspection. Id. It stated, "WinCo Foods takes great pride in having a reputation of clean, friendly, well-stocked stores. Under your management, the Pittsburg store #63, and now the Vacaville store #60 has not consistently demonstrated this." Id. It continued:

You are expected to ensure that all areas of the store meet WinCo Foods' standards, not just operationally but in appearance and in presentation. You are expected to walk the store at the beginning of your shift and throughout the day to ensure your employees are following your directives, and you are expected to communicate with the members of your management team (Assistant Store Managers and the Department managers), as well as with hourly employees in the store. You are expected to work together as a management team to ensure your store as a whole is up to WinCo Foods' standards. In addition, you are also encouraged to make use of the numerous resources available to you when difficulties arise by contacting me, Pete Miller (District Manager), JoAnn Pingree (Human Resources), and/or other such appropriate individuals.

Id. It cautioned: “Any failure to meet minimum standards and expectations moving forward and/or further violation of any company policy will result in further disciplinary action up to and including immediate discharge of your at-will employment at WinCo Foods.” Id.

Mr. Lopez was surprised that he was suspended, as Ms. Pingree had told him that WinCo would write up another employee, but that Mr. Lopez would not be disciplined for the incident. Lopez Depo. at 155:18–22. When he learned of the suspension, Mr. Lopez broke down and cried in front of Mr. Miller and Ms. Pingree because he “was still dealing with the stress at that time and still dealing with depression.” Tambling Decl. Ex. A (Lopez Depo.) at 155:3–10.

d. April 20, 2019 Incident

Mr. Lopez returned to work on April 17, 2019, four days before Easter Sunday. Lopez Depo. at 166:24–167:9. The schedule for the upcoming week and holiday weekend had been

written in Mr. Lopez's absence, and Mr. Lopez does not recall reviewing the schedule to determine whether appropriate staffing had been scheduled. Id. at 168:8–18. Appropriate staffing had not been scheduled; the store was understaffed on April 20, 2019. Id. at 198:6–10, 199:21–200:10 (agreeing that the schedule did not sufficiently staff the store but contending that Mr. Lopez should not be responsible for it). The employee designated as produce opener had not come in. Tambling Decl. Ex. F (Pingree Depo.) at 192:6–10.

Mr. Miller visited the Vacaville store on April 20, 2019 at around 12:30 p.m. Lopez Depo. at 187:4–8; Lopez Depo. Ex. 12. He found that the Easter promotion aisle “was just in complete disarray,” as if it had been “shopped so hard from the day before” and “nobody had even [come] in to face it up, make it look good. It was just shambles.” Miller Depo. at 194:13–25. Mr. Lopez was checking out customers at the registers. See Lopez Depo. at 170: 14–17, 190:4–7.

Conditions Mr. Miller observed at the store included:

Produce

- The bag salad area had numerous out-of-stocks.
- The entire pre-packaged individual serving salad display was almost empty. There were only a few of these salads available for our customers.
- The margarita salt and specialty seasoning display included a crate that was almost empty. The rest of this display was in disarray.
- There were two watermelon bins on display. One of the bins was so low that customers would have difficulty getting this heavy product out of the display.
- There were three large boxes of red potatoes on display. These three boxes only had approximately ten potatoes for sale.
- There were three boxes of white potatoes on display. One of these boxes was completely empty. The other two boxes had only a thin layer of potatoes at the bottom of each box.
- There were six boxes of Klondike (3lb.) bagged potatoes on display. In this entire six foot sales space there were only approximately 5 bags of potatoes available for sale.
- There were three boxes of fresh pineapples on display. In these boxes there were only three (3) pineapples available for sale.
- Throughout the department there were various other displays that were not full, faced and/or visually acceptable for our customers. Most notable products include the baby carrots, cucumbers, bagged sweet peppers, collard greens, artichokes, green onions, bagged [green] beans and Curly mustard. . . .

Variety:

- The Easter candy aisle was in total disarray.
- There were many empty candy display boxes left on the shelves.
- The items that were on the shelves were not faced. The entire aisle was unorganized and disheveled.

- 1 • There was an abundance of shelf space that was left completely empty.
2 **Throughout the store there were additional issues:**
3 • The beer cooler and bomber beer case had numerous out-of-stocks. Th product that
4 was available had not been faced.
5 • The chip aisle had numerous out-of-stocks and had an overall messy appearance.
6 • There was debris on the floor of the men's bathroom.
7 • The bulk foods spice area was dirty.

8 Miller Depo. Ex. 23. The lines at the store's registers were also "atrocious," as "lines [were]
9 backed up to the bread aisle." Id.

10 Mr. Lopez attributed the condition of the store to it being "one of those chaotic days."
11 Lopez Depo. at 170:8. He continued, "I'm sure you can imagine in a grocery store before Easter,
12 it was pretty intense." Id. at 170:8–10. Mr. Lopez had arranged for an assistant manager from
13 another store to work through the weekend. Tambling Decl. Ex. N (5/17/19 email). On the day of
14 April 20, 2019—but not in the days leading up to April 20, 2019—Mr. Lopez had tried to get
15 more cashiers to come into work, but it was hard to get people to come in on an off-day during a
16 holiday weekend. Lopez Depo. at 202:4–203:2. In Mr. Miller's view, the schedule "was written
17 by somebody with very little experience in schedule writing" as there were not nearly enough
18 cashier shifts for the Saturday before Easter. Miller Depo. at 169:16–170:15. Mr. Miller believed
19 that Mr. Lopez should have seen the schedule on April 17 and started to ask additional employees
20 if they could work that Saturday; if no one was available, he could have picked up the phone and
21 called Mr. Miller, or reached out to other stores to see if people would work. Id. at 171:2–15.

22 In addition to the staffing issues, Mr. Lopez did not adequately walk the store on April 20,
23 2019. Upon review of surveillance footage of the Vacaville store on April 20, 2019, WinCo
24 determined that Mr. Lopez had not walked the Easter promotion aisle at all until after Mr. Miller
25 had arrived, and did not check the produce department again, following his initial morning walk-
26 through, until Mr. Miller arrived. Id. at 154:4–155:13; Miller Depo. Ex. 11.

27 **5. April 26, 2019 to May 13, 2019 Leave of Absence**

28 On April 26, 2019, before any discipline had occurred in connection with the April 20,
29 2019 incident, Mr. Lopez emailed Mr. Miller and Ms. Pingree to say that he was "really not
30 feeling well" and needed to take a sick day. Pingree Decl. Ex. A. The next day, he emailed again

1 to say that his doctor was taking him off of work until May 13, 2019, after his next appointment.
2 Pingree Decl. Ex. B (“I’m stuck in this cycle of my health affecting my work which affects my
3 health and so on.”). Ms. Pingree responded that Mr. Lopez should “be sure to contact FMLA
4 Source to apply for FMLA protections” and notify payroll about his leave. Id.⁴

5 **6. Termination**

6 While Mr. Lopez was on leave, Mr. Miller, Ms. Pingree, and Ms. Lebold decided to
7 terminate his employment. Miller Depo. at 34:6–22. Mr. Miller felt that Mr. Lopez brought
8 discredit to WinCo, as the company’s motto is “full, fresh, and clean” but “that store is completely
9 filthy and it’s—I’ll just use the word ‘shambles’; right? It’s in complete disarray. . . . We don’t
10 operate that way.” Id. at 206:1–10. WinCo informed Mr. Lopez of his termination upon his return
11 to work on May 13, 2019. Lopez Depo. at 15:13–15; Miller Depo. Ex. 12. Mr. Miller sent Mr.
12 Lopez a Notice of Separation in which he outlined Mr. Lopez’s “ongoing performance concerns”
13 starting with the January 2018 written warning and continuing through the incidents at the
14 Vacaville store. Id. He wrote:

15 Unfortunately, even upon this store transfer to a different store
16 location, you failed to adequately fulfill your job responsibilities in
17 ensuring the store conditions were acceptable for our customers.
18 Due to reports of ongoing substandard store conditions, I coached
19 you on numerous occasions regarding the significance of
maintaining store conditions throughout the entire store. Even after
these matters were brought to your attention, you failed to take
appropriate steps to rectify the issues.

20 Id. Mr. Miller detailed the issues he observed on April 20, 2019, and stated, “This is especially
21 disturbing since you have been advised on numerous occasions that the conditions of the produce
22 department are paramount in how our customers view the store. Even after numerous discussions
23 and being disciplined for unacceptable conditions, you still failed to take appropriate actions to
24 ensure the department was ready for our customers.” Id. He continued: “Jason, we have

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26 ⁴ Mr. Lopez states in his opposition brief that “Even though WinCo gave Mr. Lopez the time off,
27 WinCo denied MR. Lopez FMLA leave.” Opp’n at 10 (citing Tambling Decl. Ex. R (FMLA
denial) at C000664). The cited document, from May 17, 2019, states “FMLA/STATE DENIED
4/26/19–5/12/19.” See Tambling Decl. Ex. R (FMLA denial) at C000664. At the motion hearing
28 on August 19, 2019, however, Mr. Lopez conceded that he was granted FMLA even if it was not
designated as such.

1 discussed before that as Store Manager, you are responsible for all areas of the store, including but
2 not limited to the overall appearance of the store. . . . As has been explained and discussed before,
3 your lack of attention to this critical area affects WinCo Foods' and the Vacaville store's ability to
4 attract and retain customers and sell groceries.” Id. Because Mr. Miller found that Mr. Lopez
5 “acted in a manner contrary to the interests of WinCo and below the standards we expect,” he
6 informed Mr. Lopez that his employment was terminated immediately. Id.

7 Mr. Lopez disagrees with this characterization of his work performance. He notes that
8 WinCo did not discipline him once between 1994 and January 2018. Lopez Decl. ¶ 2. A Regional
9 VP at WinCo told him that he was being sent to “the struggling Pittsburg store because [his] skills
10 would benefit” it. Id. ¶ 3. He felt that when he got to the Vacaville store, it was in bad shape, and
11 that “[w]hile I was there, we made strides.” Lopez Depo. at 151:12–15; see also id. at 151:21–23
12 (“I made so much progress in that store in the short time that I was there.”). He asserts that the
13 Vacaville “store was dirty, in poor repair, dimly lit” and “needed painting in many areas,” when he
14 arrived, and that both employee morale and customer service improved in his time there. Id. at
15 152:18–22. He also states that the produce department at the Vacaville store was the worst in the
16 division and had improved during his time there. Id. at 152:23–153:1. Employees told him that it
17 had “improved drastically” in the months he was there. Id. at 154:13–14.

18 A group of employees from the Vacaville store sent Ms. Pingree a letter expressing support
19 for Mr. Lopez following his termination. Tambling Decl. (dkt. 45-1) Ex. F (Pingree Depo.) at
20 227:10–18; Tambling Decl. Ex. U (Letter). This unsigned letter is of meager evidentiary value.
21 Mr. Lopez also submits a declaration from the previous store manager at the Vacaville store, Tony
22 Mahle. Mahle Decl. (dkt. 45-3). Mr. Mahle was “shocked” that WinCo terminated Mr. Lopez, as
23 he asserts that Vacaville “was always a struggling store” and always had a problematic produce
24 department, with understaffing and bad produce, and yet he was never written up or disciplined.
25 Id. at ¶¶ 3, 5–8, 11.⁵

26 _____
27 ⁵ Significantly, WinCo notes that Mr. Lopez never disclosed Mr. Mahle in his initial disclosures,
28 and argues that the Court should strike his declaration. See Reply (dkt. 46) at 7 n.8 (citing Fed. R. Civ. P. 37(c)(1) (“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a

1 About a month after Mr. Lopez was terminated, approximately six managers (presumably
2 store managers) were moved to different stores. Tambling Decl. Ex. C (Miller Depo.) at 98:18–
3 21. Less than six months after Mr. Lopez was terminated, the new store manager in Vacaville had
4 the store fully staffed. See Fitch Decl. Ex. B (Seashore Depo.) at 138:22–139:2.

5 **B. Litigation History**

6 After exhausting his administrative remedies, Mr. Lopez brought suit in September 2019.
7 See Compl. He brings claims for: (1) disability discrimination in violation of the Fair
8 Employment and Housing Act (FEHA); (2) failure to provide reasonable accommodation in
9 violation of FEHA; (3) failure to engage in the interactive process in violation of FEHA; (4)
10 retaliation in violation of FEHA; (5) failure to prevent discrimination, harassment, and retaliation
11 in violation of FEHA; and (6) Family and Medical Leave Act (FMLA) interference. Id. at ¶¶ 47–
12 104. WinCo now moves for summary judgment on each claim. See MSJ.

13 **II. LEGAL STANDARD**

14 Summary judgment is proper where the pleadings, discovery, and affidavits show that
15 there is “no genuine dispute as to any material fact and the [moving] party is entitled to judgment
16 as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome
17 of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a
18 material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for
19 the nonmoving party. Id.

20 The moving party for summary judgment bears the initial burden of identifying those
21 portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine
22 issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). Where the moving

23
24 motion, at a hearing, or at a trial”); see also Fitch Decl. (dkt. 46-1) Ex. A (Plaintiffs’ Initial
25 Disclosures). Mr. Lopez conceded at the motion hearing that he only disclosed “WinCo
26 employees” in his initial disclosures and did not disclose Mr. Mahle by name until his
supplemental disclosures on August 16, 2021—three days before the motion hearing. This is
hardly adequate notice. See Chapman v. Pier 1 Imports (U.S.) Inc., 870 F. Supp. 2d 995, 1002
(E.D. Cal. 2012). Nor should it have been clear to WinCo that Mr. Lopez would rely on evidence
from Mr. Mahle, as Mr. Mahle never worked with or supervised Mr. Lopez. Although the Court
is concerned about prejudice to WinCo from Mr. Lopez’s late disclosure, the Court will allow Mr.
Mahle’s declaration, as that evidence does not change the outcome of the pending motion.

1 party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no
2 reasonable trier of fact could find other than for the moving party. Id. But on an issue for which
3 the opposing party will have the burden of proof at trial, the moving party need only point out
4 “that there is an absence of evidence to support the nonmoving party’s case.” Id.

5 Once the moving party meets its initial burden, the nonmoving party must go beyond the
6 pleadings to demonstrate the existence of a genuine dispute of material fact by “citing to specific
7 parts of material in the record” or “showing that the materials cited do not establish the absence or
8 presence of a genuine dispute.” Fed. R. Civ. P. 56(c). A triable dispute of fact exists only if there
9 is sufficient evidence favoring the nonmoving party to allow a jury to return a verdict for that
10 party. Anderson, 477 U.S. at 249. If the nonmoving party fails to make this showing, “the
11 moving party is entitled to judgment as a matter of law.” Celotex, 477 U.S. at 323.

12 III. DISCUSSION

13 A. Disability Discrimination Claim

14 Under FEHA, it is unlawful for an employer “to discriminate against the [employee] in
15 compensation or in terms, conditions, or privileges of employment” due to the employee’s
16 physical or mental disability. Cal. Gov’t Code § 12940(a). The McDonnell Douglas Corp. v.
17 Green, 411 U.S. 792 (1973) burden-shifting framework applies to Mr. Lopez’s disability
18 discrimination claim under FEHA. See Guz v. Bechtel Nat’l, Inc., 24 Cal 4th 317, 354 (2000). It
19 requires Mr. Lopez to first establish a prima facie case of discrimination by showing: (1) that he
20 suffers from a disability; (2) that he was otherwise qualified to do his job; (3) that he was
21 subjected to an adverse employment action; and (4) indica of discriminatory motive. See Faust v.
22 Cal. Portland Cement Co., 150 Cal. App. 4th 729, 745 (2007). If Mr. Lopez can establish all of
23 the elements of a prima facie case, WinCo would then have the burden of proffering a legitimate,
24 non-discriminatory reason for its adverse employment actions. See id. If WinCo can do so, the
25 burden would then shift back to Mr. Lopez to offer evidence that WinCo’s stated reason was either
26 false or pretextual, or evidence that WinCo acted with discriminatory animus, or evidence of each
27 that would permit a reasonable factfinder to conclude that WinCo intentionally discriminated
28 against him. See id.

1 Mr. Lopez contends that three actions by WinCo demonstrate disability discrimination: (1)
2 his transfer to the Vacaville store, (2) his suspension, and (3) his termination. See Opp'n at 12.

3 **1. Transfer to Vacaville**

4 Mr. Lopez first points to his transfer to the Vacaville store as an adverse employment
5 action that he suffered as a result of disability discrimination. See Opp'n at 12–14. This does not
6 hold water.

7 It is true that the Ninth Circuit takes an “expansive view of the type of actions that can be
8 considered adverse employment actions,” and that specifically “disadvantageous transfers or
9 assignments” can constitute adverse employment actions. See Ray v. Henderson, 217 F.3d 1234,
10 1241 (9th Cir. 2000). Even so, it is difficult to see how transfer from the Pittsburg store, a place
11 that reportedly “sucks the life out of you,” see Lopez Depo. Ex. 7, to most anywhere else—even a
12 store with human resource issues, Tambling Decl. Ex. A (Lopez Depo.) at 120:10–6, that was
13 “dirty, in poor repair, dimly lit” and “needed painting in many areas,” id. at 152:18–22, and that
14 featured one of the worst produce departments in the district, id. at 152:23–25—is a
15 disadvantageous transfer. Mr. Lopez retained the same title at both stores and his responsibilities
16 remained the same at both stores. He did not have job duties transferred away from him. See
17 Yartzoff v. Thomas, 809 F.2d 1371, 1373 (9th Cir. 1987).

18 Nor did Mr. Lopez find himself transferred without his consent. See St. John v.
19 Employment Development Dept., 642 F.2d 273, 274 (9th Cir. 1981). Mr. Lopez asked for and
20 accepted the transfer. He did so hoping that “there would be less chances that I would be
21 assaulted or get beat up,” Lopez Depo. at 121:16–18, and does not recall being assaulted at the
22 Vacaville store, id. at 121:21–24. The Ninth Circuit defines an “adverse employment action” as
23 one “likely to deter employees from engaging in protected activity,” Ray, 217 F.3d at 1243, and
24 also as one that “materially affect[s] the compensation, terms, conditions, or privileges of . . .
25 employment,” Martinez v. Costco Wholesale Corp., 481 F. Supp. 3d 1076, 1091 (S.D. Cal. 2020)
26 (internal quotation marks omitted). Transferring a store manager from one store where he was
27 “threatened and assaulted multiple times by customers and shoplifters,” Lopez Depo. at 50:20–
28 53:20—at his request and with his consent—to another store where he was not threatened or

1 assaulted meets neither definition.

2 Even if the transfer to Vacaville constituted an adverse employment action, though, Mr.
3 Lopez's argument that WinCo undertook that action because of discriminatory motive plainly
4 fails. Mr. Lopez argues: "The timing of Mr. Lopez's transfer also raises an inference of
5 discriminatory animus" because "Mr. Lopez disclosed his disability on December 10, 2018" and
6 "WinCo transferred Mr. Lopez to [the Vacaville store] almost immediately thereafter, on January
7 13, 2019." Opp'n at 13. But that factual recitation is incomplete. Mr. Lopez did not just disclose
8 his disability in his December 10 email; the "main reason" for that email was to request a transfer
9 out of Pittsburgh. See Lopez Depo. Ex. 7. That WinCo transferred Mr. Lopez so soon after he
10 requested a transfer is not suspicious. Mr. Lopez thus fails to meet the "indica of discriminatory
11 motive" requirement to establish a prima facie case.⁶ See Faust, 150 Cal. App. 4th at 745.

12 The transfer to Vacaville does not support a disability discrimination claim.

13 **2. Suspension**

14 The second basis for Mr. Lopez's disability discrimination claim is his suspension. See
15 Opp'n at 12.

16 **a. Prima Facie Case**

17 Mr. Lopez argues that his suspension—indisputably an adverse employment action—
18 resulted from discriminatory motives. See Opp'n at 14–15. WinCo argues that no one at WinCo
19 "ever made any discriminatory or unkind remark about his depression," and so Mr. Lopez cannot
20 establish a prima facie case. MSJ at 12. But WinCo cites no authority for the proposition that
21 discriminatory motives must always be revealed through unkind words. And Mr. Lopez argues
22 that the timing of his suspension—three months after Mr. Lopez disclosed his depression, see

23
24

⁶ And even if Mr. Lopez had established a prima facie case of disability discrimination based on
25 his transfer, WinCo has established a legitimate and non-discriminatory reason for the transfer:
26 Mr. Lopez asked for the transfer and he accepted it. Mr. Lopez's argument that "the stated reason
27 for transferring Mr. Lopez to [the Vacaville] store—that no other openings were available—was
28 clearly pretextual," see Opp'n at 13, is also incorrect. Mr. Lopez argues only that WinCo could or
should have had other store managers transfer out of their stores so that Mr. Lopez could transfer
in. See id. at 14. He does not contend that there were actually vacancies at any other stores. He
therefore has not established that WinCo's stated reason for transferring Mr. Lopez from Pittsburgh
to Vacaville was pretextual.

Lopez Depo. Ex. 7, two months after he stated on his proof of workers' compensation claim form that he was experiencing depression, anxiety, anger, thoughts of self harm, and withdrawal from family, see Tambling Decl. Ex. I (WC forms), LOPEZ000370–75, during a time when WinCo knew that Mr. Lopez was seeing a counselor, and just days after Mr. Miller had called Mr. Lopez and learned that Mr. Lopez was not at the store because he was attending a counseling session, Tambling Depo. Ex. A (Lopez Depo.) at 123:12–17—arguably supports an inference of a discriminatory motive. See Opp'n at 15; Stegall v. Citadel Broadcasting Co., 350 F.3d 1061, 1069 (9th Cir. 2003) (timing of “adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation”).

WinCo's better argument is its next one.

b. Legitimate, Non-Discriminatory Reason

WinCo asserts that it has legitimate, non-discriminatory reasons for suspending Mr. Lopez: the Vacaville store conditions observed on March 17, 24, and 26, 2019, and Mr. Lopez's failure to walk the produce department later in the day on March 26, 2019. MSJ at 12. Poor job performance is a legitimate, non-discriminatory reason for an adverse employment action. See Pottenger v. Potlatch Corp., 329 F.3d 740, 746 (9th Cir. 2003).

c. Pretext

Mr. Lopez responds that WinCo's reasoning for his suspension was pretextual and that he was suspended not because of the poor store conditions but because of his disability. See Opp'n at 14–15. A plaintiff

cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. [Citations.] Rather, the [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them ‘unworthy of credence,’ [citation], and hence infer ‘that the employer did not act for the [asserted] non-discriminatory reasons.’ [Citations.]”

Hersant v. Dept. of Social Services, 57 Cal. App. 4th 997, 1005 (1997). Employers have the “leeway to make subjective business decisions, even bad ones.” Pottenger, 329 F.3d at 748. To

1 demonstrate that WinCo’s proffered reason was mere pretext, Mr. Lopez “must put forward
2 specific and substantial evidence challenging the credibility of [WinCo’s] motives.” See Vasquez
3 v. County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003).

4 Mr. Lopez does not dispute that the conditions documented in the March 17 and March 24
5 photographs, and observed on March 26, were unacceptable. See Lopez Depo. at 146:7–15 (re
6 March 24, assistant manager “made it sound like it wasn’t bad,” but could not disagree with Mr.
7 Miller about the condition of the store as he was not there); 148:4–150:18 (re March 26, “I feel
8 that day was kind of an outlier more than the norm, the way they make it sound”); 154:10–11
9 (“What Pete saw on the 26th was pretty commonplace before I got there.”). What he argues,
10 instead, is that these poor conditions were typical of the Vacaville store even before his arrival.
11 See Opp’n at 14–15. He contends that WinCo’s proffered reason was pretext because “store
12 conditions far worse than these long predicated Mr. Lopez’s management of [the Vacaville store]”
13 and WinCo never disciplined the previous store manager for the poor conditions. See Opp’n at
14 14–15.⁷

15 There is evidence that the Vacaville store’s produce department was the worst in the
16 district, and that WinCo “coached” the previous store manager, Mr. Mahle, that “the department
17 needed to be better.” Tambling Decl. Ex. A (Lopez Depo.) at 152:23–25; Mahle Decl. ¶ 6; Fitch
18 Decl. Ex. B (Seashore Depo.) at 81:9–12 (worst in the district when understaffed). The produce
19 department “was always problematic” “because of staffing issues and bad produce,” and yet Mr.
20 Mahle asserts that he “was never written up or disciplined” for its condition. Mahle Decl. ¶¶ 7–8.
21 On the other hand, Mr. Miller only supervised Mr. Mahle from June 2018 until December 2018,
22 and Mr. Lopez presents no evidence that Mr. Miller observed the same conditions with Mr. Mahle
23 that he did with Mr. Lopez. See Miller Depo. at 21:13–15; Supp. Pingree Decl. (dkt. 46-2) ¶ 2. In
24 addition, there were significant differences between Mr. Lopez’s tenure and Mr. Mahle’s.⁸ Still,

25 _____
26 ⁷ Mr. Lopez actually argues that WinCo “did not discipline previous SMs”—plural—“for these
27 issues,” Opp’n at 15, but only cites to evidence regarding the store manager immediately
preceding Mr. Lopez, see id. at 15:4–8 (re Mr. Mahle).

28 ⁸ For example, while the store was understaffed at times under Mr. Mahle, “the quality of help was
not there when Jason Lopez showed up. They had the bodies. They just weren’t the right ones.”
Fitch Decl. Ex. B (Seashore Depo.) at 81:15–20; see also id. at 77:17–20 (same). The problem of

1 the produce manager for the Vacaville store for the fourteen years before Mr. Lopez was
2 transferred there also said that the department was often understaffed. Tambling Decl. Ex. J
3 (Frazier Depo.) at 21:10–21. He testified that it was not unusual for vegetable displays not to be
4 full or for some of the items to be out of stock. Id. at 49:21–50:13. And Mr. Lopez testified that
5 the produce department had improved dramatically in the couple months that he was there. Lopez
6 Depo. at 154:8–18. While this evidence does not demonstrate that the conditions at the store were
7 “far worse” before Mr. Lopez’s tenure, it at least shows that poor conditions in the Vacaville store,
8 specifically the produce department, were not altogether new.

9 What Mr. Lopez’s argument misses, though, is that while the previous store manager may
10 have been coached about improving the produce department, see Mahle Decl. ¶ 6, Mr. Lopez had
11 received a written warning just over a year earlier, before he disclosed his depression to WinCo.
12 Lopez Depo. Ex. 6. The warning detailed numerous similar problems at the Pittsburg store. Id.
13 (listing “acceptable and intolerable store conditions”). And it explained WinCo’s expectations.
14 Mr. Lopez was “expected to walk the sales floor . . . on a regular basis to [assess] store conditions
15 and then develop a plan to remedy any issues” to “ensure each department [is] up to Company
16 standards.” Id. The warning cautioned Mr. Lopez that “[f]ailure to meet minimum standards and
17 expectations moving forward and/or further violation of any company policy will result in further
18 progressive disciplinary action up to and including your immediate discharge of your at-will
19 employment.” Id.

20 Mr. Lopez was not suspended after the March 17 and 24 incidents; instead, Mr. Miller told
21 him: “We’ve got to get this fixed. This shouldn’t be happening.” Miller Depo. at 114:9–14. Mr.
22 Miller told him “that poor store conditions (such as those found on March 17 and March 24) were
23 unacceptable and that serious consequences would occur if such conditions were to take place
24 again in the future.” Id. at 122:15–19. When Mr. Miller visited the Vacaville store on March 26,

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26 having produce department staff call out increased under Mr. Lopez’s watch. See id. at 82:8–24.
27 The produce manager complained that Mr. Lopez would never send help his way” when there
28 were call-outs. Id. at 122:18–22. When Mr. Seashore suggested to Mr. Lopez that he hire better
quality employees, Mr. Lopez said that he was “too busy to do that,” so Mr. Seashore stepped in to
helped hire for the first time in nine years. Id. at 83:10–19. There is no evidence that Mr. Mahle
exhibited these same problems, aside from suffering from occasional understaffing.

he observed that the produce department was “in complete shambles,” with empty produce bins and bad product on display. Miller Depo. at 117:5–13, 131:25. The state of the produce department was “particularly concerning” to Mr. Miller as they had just spoken of “the importance of [Mr. Lopez] focusing [his] attention on this critical department.” Miller Depo. Ex. 9. But Mr. Miller also explained that it was “very disappointing and completely unacceptable that at the time of [the] store visit (approximately noon)[, Mr. Lopez] had failed to return to the [produce] department to check the status of the conditions and ensure the department was ready for our customers.” Id. Mr. Lopez conceded that on March 26, he “wasn’t able to circle back around” to walk the store. Lopez Depo. at 150:9–18. The suspension letter emphasized: “You are expected to walk the store at the beginning of your shift and throughout the day to ensure your employees are following your directives. . . .” Miller Depo. Ex. 9.

In sum, Mr. Lopez’s produce department was “in complete shambles” just a couple of days after his supervisor had told him to “get this fixed,” and he did not walk the store to identify and remedy problems, which WinCo had directed him, in a written warning, to do. Given the state of the record, it is not “unworthy of credence” that WinCo suspended Mr. Lopez for his poor job performance, and not because of his disability. See Hersant, 57 Cal. App. 4th at 1005.

3. Termination

The third basis for Mr. Lopez’s disability discrimination claim is his termination. See Opp’n at 12.

a. Prima Facie Case

For the same reasons Mr. Lopez has likely made out a prima facie case as to his suspension, he likely has as to his termination. In addition to the timing issues discussed above, Mr. Lopez requested FMLA leave on April 27, 2019 for his ongoing depression. Pingree Decl. Ex. B (“I’m stuck in this cycle of my health affecting my work which affects my health and so on.”). Mr. Miller, Ms. Pingree, and Ms. Lebold decided to terminate his employment while he was on leave. Miller Depo. at 34:6–22. They informed Mr. Lopez of his termination when he returned from his leave on May 13, 2019. Lopez Depo. at 15:13–15; Miller Depo. Ex. 23. The timing of his request for leave and his termination is some prima facie evidence of discriminatory

1 motive. See Stegall, 350 F.3d at 1069.

2 **b. Legitimate, Non-Discriminatory Reason**

3 Again, though, WinCo points to a legitimate, non-discriminatory reason for the adverse
4 employment action: the Vacaville store conditions observed on April 20, 2019, and Mr. Lopez's
5 failure to walk the store that same day. MSJ at 12. Poor job performance is a legitimate, non-
6 discriminatory reason for an adverse employment action. Pottenger, 329 F.3d at 746.

7 **c. Pretext**

8 Mr. Lopez argues that WinCo's proffered reason is a pretext and that WinCo really
9 terminated him because of his disability. See Opp'n at 15–17. Mr. Lopez argues that "Mr. Miller
10 chose to conduct his visit one day before Easter" and only three days after Mr. Lopez returned
11 from his suspension. Id. at 16. He argues that the store was understaffed—something for which
12 WinCo never disciplined Mr. Mahle—and that Mr. Lopez could not have made systematic
13 improvements in the produce department in just three days. Id. He argues, too, that he had made
14 significant progress in improving the Vacaville store. Id. at 16–17.⁹

15 It is not improper for WinCo to inspect a store on the day before Easter or shortly after an
16 employee returns from a suspension. The evidence is that Mr. Miller visits stores within the
17 Northern District of California every two to three weeks. Miller Depo. at 27:8–28:12. Even if he
18 did not ordinarily do so, Mr. Miller had reason to be concerned about Mr. Lopez's performance
19 following his suspension.

20 And, undeniably, the conditions Mr. Miller found during his inspection on April 20 were
21 substandard. While the produce department had numerous problems (such as out-of-stock items,
22 just three pineapples available for sale, a display in "disarray"), Miller Depo. Ex. 12, the problems

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⁹ Mr. Lopez argues that WinCo failed to preserve all of its reports about his performance at the
25 Vacaville store and so the Court should presume that the information was unfavorable to WinCo.
Opp'n at 17 (citing Fed. R. Civ. P. 37). Rule 37 requires that a Court find "that the party acted
26 with the intent to deprive another party of the information's use in the litigation," see Fed. R. Civ.
P. 37(e)(2) and the Court has no basis to so find. WinCo represents that it only maintained the
27 records of Mr. Seashore's visits for 15 months, and by the time Mr. Lopez requested them in
discovery, they had been destroyed. Reply at 11 n.13. Because Mr. Seashore did not manage Mr.
28 Lopez and had never been involved in disciplining store managers, see Fitch Decl. Ex. B
(Seashore Depo.) at 100:4–6, it was reasonable for WinCo not to retain the records.

1 went beyond the produce department. This is another contrast with Mr. Mahle, whose problems
2 almost exclusively involved the produce department. See Mahle Decl. ¶¶ 6–9 (produce
3 department was the worst; never written up for produce department). The Easter promotion aisle
4 on April 20 “was just in complete disarray” and “just shambles,” Miller Depo. at 194:13–25, the
5 chip aisle was messy, the men’s bathroom had debris on the floor, and the bulk foods spice area
6 was dirty, Miller Depo. Ex. 12. The lines were “atrocious,” and Mr. Lopez was busy checking out
7 customers at the registers. Id.; Lopez Depo. at 170:14–17, 190:4–7. Mr. Lopez does not dispute
8 the state of the store on April 20 but contends that it was a chaotic and intense day. See Lopez
9 Depo. at 170:8–10. But that WinCo expects its stores to be “full, fresh, and clean” even on busy
10 days is not for the Court to second-guess. See Miller Depo. at 206:1–10; Hersant, 57 Cal. App.
11 4th at 1005 (factual dispute at issue is whether discriminatory animus motivated the employer, not
12 whether the employer is wise, shrewd, prudent, or competent.”).

13 Nor in holding Mr. Lopez responsible for the store on April 20 was WinCo asking him to
14 resolve overnight what took six months to resolve after his termination. There were concrete and
15 achievable steps that WinCo expected Mr. Lopez to take to improve the store in the short term.
16 Mr. Miller concluded that Mr. Lopez should have been proactive in the days leading up to April
17 20, checking the schedule and trying to bring in more employees¹⁰—and if no one was available to
18 work, he should have called Mr. Miller. Miller Depo. at 171:2–15. Moreover, Mr. Lopez did not
19 walk the Easter promotion aisle at all until after Mr. Miller arrived on April 20, and did not check
20 the produce department a second time until Mr. Miller arrived. Miller Depo. at 154:4–155:13;
21 Miller Depo. Ex. 11. This is still another contrast with Mr. Mahle; there is no evidence that Mr.
22 Mahle regularly failed to walk the store. Both the failure to bring in adequate additional help (or
23 to seek help from his superiors) and the failure to walk the store plainly contributed to the
24 unsatisfactory conditions at the store on April 20. See Miller Depo. Ex. 12 (explaining, “you did
25 not provide the necessary staffing assistance nor did you adequately monitor progress throughout
26 the morning to make sure it was acceptable for our customers” and “[e]ven after numerous
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28 ¹⁰ He did apparently bring in one, but not a cashier. See Tambling Decl. Ex. N (5/17/19 email).

1 discussions and being disciplined for unacceptable conditions. . . . you failed to take ownership of
2 the situation"). Moreover, both followed a series of other incidents from which Mr. Lopez could
3 have learned. See id. ("WinCo Foods has been continually addressing ongoing performance
4 concerns. . . . Under your management, we have now had two stores . . . that have not consistently
5 demonstrated [WinCo's goals]."). Mr. Lopez's failure to get adequate help for a busy day when
6 the schedule showed that the store would be understaffed was contrary to the instruction in his
7 April 2019 suspension letter that he "make use of the numerous resources available . . . when
8 difficulties arise by contacting" Mr. Miller, Ms. Pingree, or others. See Lopez Depo. Ex. 9. His
9 failure to adequately walk the store was contrary to the directive he had received in his written
10 warning in January 2018, Lopez Depo. Ex. 6, and which WinCo repeated in his April 2019
11 suspension letter, Miller Depo. Ex. 9.

12 Given the state of the record, it is not "unworthy of credence" that WinCo suspended Mr.
13 Lopez for his poor job performance, and not because of his disability. See Hersant, 57 Cal. App.
14 4th at 1005.

15 Accordingly, the disability discrimination claim fails.

16 **B. Reasonable Accommodation Claim**

17 "FEHA requires employers to make reasonable accommodation for the known disability of
18 an employee unless doing so would produce undue hardship to the employer's operation." Nealy
19 v. City of Santa Monica, 234 Cal. App. 4th 359, 373 (2015). To prevail on a reasonable
20 accommodation claim, Mr. Lopez must establish that: (1) he has a disability; (2) he could perform
21 the essential functions of the job with reasonable accommodation; and (3) WinCo failed to
22 reasonably accommodate his disability. See id. Mr. Lopez argues that he requested three
23 accommodations for his disability—(1) "transfer to a non-struggling store or a store closer to his
24 support network"; (2) time off to attend counseling; and (3) FMLA leave—and that WinCo denied
25 him all three. Opp'n at 17.¹¹

26 _____
27 ¹¹ Earlier in his opposition brief, Mr. Lopez suggests that WinCo should have provided a fourth
28 reasonable accommodation, in January 2018, when he was exhibiting "signs of depression that
would have been clear to anyone who interacted with him," including weight gain and a
disheveled appearance. Opp'n at 3–4. He also points to his crying in front of his supervisor when

1 1. Transfer

2 Mr. Lopez argues that he requested “transfer to a non-struggling store” and for WinCo to
 3 accommodate his disability “by removing him from the stressful work environment at the
 4 Pittsburg store and bringing him closer to his support network.” Id. What he actually requested in
 5 his December 10, 2018 email was “a lateral transfer to Northern Nevada.” See Lopez Depo. Ex. 7.
 6 He explained that the Pittsburg store “sucks the life out of you,” that he did not feel safe there, that
 7 it had “grown increasingly harder to forget about the times I’ve been threatened, assaulted, nearly
 8 stabbed, and so on” and that the store “feel[s] like being in a third world country.” Id. He
 9 described his family’s problems with the Pittsburg area. Id.¹² When he met with Ms. Pingree the
 10 next day, he told her that he would also be open to transferring to the Roseville, Folsom, or Tracy
 11 stores. Tambling Decl. Ex. A (Lopez Depo.) at 116:9–16.¹³

12 There were no openings at the time of Mr. Lopez’s transfer request. Miller Depo. at
 13 60:19–61:6 (“There were no openings”), 82:23–83:1 (neither Reno store had openings).¹⁴ Mr.

14 he received the written warning about the conditions in the Pittsburg store. Id. at 4. And he
 15 complains that “WinCo made no attempts to engage in the interactive process or provide a
 16 reasonable accommodation at that time.” Id. (citing Lopez Decl. ¶ 5). Mr. Lopez does not pursue
 17 this argument later in his brief when listing the three accommodations he was denied. See id. at
 18 17 (listing accommodations and not including one from January 2018). Indeed, while “an
 19 employee is not required to use any particular language when requesting an accommodation,”
Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002), in January 2018, Mr. Lopez
 20 made no request whatsoever. Nor is there any evidence that WinCo was aware that Mr. Lopez
 21 needed an accommodation in January 2018, see Fitch Decl. Ex. B (Seashore Depo.) at 135:8–14
 22 (not aware that Mr. Lopez had a medical issue); Fitch Decl. Ex. C (Pingree Depo.) at 83:25–84:8
 23 (had not noticed that Mr. Lopez gained weight or looked disheveled); Fitch Decl. Ex. D (Miller
 24 Depo.) at 78:17–23 (did not notice weight gain or unkempt appearance in Pittsburg). Nor has Mr.
 25 Lopez identified what accommodation he needed in January 2018. See Zivkovic, 302 F.3d at
 26 1088 (“employee bears the burden of proving the existence of specific reasonable
 27 accommodations that the employer failed to provide.”).

28 ¹² Mr. Lopez did not provide any medical documentation along with this request; in addition, the
 doctor’s note he sent on December 13, 2018 stated that he could work “regular duty” and did not
 mention transferring from Pittsburg. See Supp. Pingree Decl. Ex. B.

29 ¹³ Mr. Lopez suggests that Ms. Pingree erred in not creating a reasonable accommodation file for
 him and in not providing him with reasonable accommodation paperwork, although he does not
 state the legal significance of that error. See Opp’n at 5. Ms. Pingree testified without
 contradiction that Mr. Lopez had access to the reasonable accommodation paperwork. Tambling
 Decl. Ex. F (Pingree Depo.) at 174:4–6. And regardless of the administrative process Ms. Pingree
 used, Mr. Lopez did receive a transfer.

30 ¹⁴ Mr. Lopez asserts that WinCo’s claim that “The Only Store Manager Job That Was Open Was
 in Vacaville” “is flatly false.” See Opp’n at 13. Not so. While WinCo rotated other employees to
 fill the opening created when Mr. Lopez left the Pittsburg store, the undisputed evidence is that
 there were no vacancies available when Mr. Lopez first requested a transfer, and none opened up
 until the vacancy in Vacaville. See Reply at 5; Opp’n at 6 (citing Tambling Decl. Ex. B (WinCo

1 Miller did not recall asking other store managers if they would transfer stores to accommodate Mr.
2 Lopez. Tambling Decl. Ex. C (Miller Depo.) at 81:13–82:13. But he was under no obligation to
3 do so. FEHA recognizes that reassigning an employee to a “vacant position” is a form of
4 reasonable accommodation. Green v. Crossmark, Inc., No. 08-02230-VBF(AJWx), 2009 WL
5 10672771, at *2 (C.D. Cal. Sept. 16, 2009). However, FEHA does not require employers to create
6 new positions to accommodate employees. Id.; Nadaf-Rahrov v. Neiman Marcus Group, Inc., 166
7 Cal. App. 4th 952, 963 (2008) (“[t]he position must exist and be vacant”); 2 Cal. Code. Regs. §
8 11068(d)(4) (“employer . . . is not required to create a new position to accommodate an employee
9 with a disability to a greater extent than an employer would offer a new position to any employee,
10 regardless of disability.”). Nor was WinCo obligated to bump one of the store managers from
11 Reno, Roseville, Folsom, or Tracy to make a position available for Mr. Lopez. See Green, 2009
12 WL 10672771, at *2.

13 Mr. Lopez recognized this reality. See Lopez Depo. Ex. 7 (“I know it could be a long time
14 until a spot opens up again if ever. I would just ask that you please heavily consider me if a spot
15 does open.”); Lopez Depo. at 114:13–115:19 (acknowledging that “WinCo wouldn’t be able to
16 just transfer [him] to one of those locations without transferring somebody else out”). He
17 maintains, though, that transferring him to one of the other stores would not have created an undue
18 hardship for WinCo, as it routinely transfers managers between stores. Opp’n at 18. Mr. Lopez’s
19 evidence for this is that WinCo filled “open SM positions at its stores in Tracy and Reno on the
20 same day it transferred [him] to Vacaville.” Id. But WinCo explains that those transfers occurred
21 because Mr. Lopez created an opening when he left the Pittsburg store: the Tracy store manager
22 left to fill the Pittsburg opening, and a Reno assistant store manager was promoted to fill the
23 opening in Tracy. Id.; Opp’n at 6 (citing Tambling Decl. Ex. B (WinCo Partial Transfer Records)
24 at D001107, D001111). Mr. Lopez also argues that WinCo had transferred him seven times, and
25 that a month after his termination, WinCo transferred eight other managerial employees to other
26 stores. Opp’n at 18. But as WinCo points out, Mr. Lopez worked in just three stores as a store
27

28 Partial Transfer Records) at D001107, D001111).

1 manager and was only transferred to the third, Vacaville, at his own request. See Reply at 5
2 (citing Lopez Depo. at 19:1–21:7, 33:13–15, 34:20–25). Moreover, while WinCo concedes that it
3 rotated six store managers in June 2019, no evidence suggests that WinCo routinely did so, or
4 anticipated doing so at the time of Mr. Lopez’s transfer request. See Reply at 5.

5 WinCo did not have an obligation to choose the specific accommodation—a store manager
6 position in Reno—that Mr. Lopez sought. See Raine v. City of Burbank, 135 Cal. App. 4th 1215,
7 1222 (2006). It did not have an obligation to transfer him to a stress-free store. See Zivkovic, 302
8 F.3d at 1088 (“employee bears the burden of proving the existence of specific reasonable
9 accommodations that the employer failed to provide.”); Jackson v. County of Los Angeles, 60 Cal.
10 App. 4th 171, 191 (1997) (employee who “had to have a stress-free job” could not work as a
11 safety police officer); Gaul v. Lucent Techs., Inc., 134 F.3d 576, 581 (3d Cir. 1998) (“AT&T
12 could never achieve more than temporary compliance because compliance would depend entirely
13 on Gaul’s stress level at any given moment.”). As soon as a store manager position opened up and
14 there was an opportunity to transfer Mr. Lopez away from the Pittsburg store, WinCo offered Mr.
15 Lopez the position, and he accepted it. Miller Depo. at 83:5–10; Lopez Depo. at 121:16–18. That
16 was a reasonable accommodation of Mr. Lopez’s request for a transfer.¹⁵

17 2. Time Off for Counseling

18 Mr. Lopez next argues that he requested time off to attend counseling, and that WinCo
19 failed to fully accommodate his request because he was “not always able to take time off to attend
20 counseling.” Opp’n at 19. Mr. Lopez testified, though, that he did not recall Mr. Miller ever
21 denying his request to take time off for counseling sessions. Lopez Depo. at 113:11–15. His
22 testimony that Mr. Miller once called him while he was in a counseling session to ask for his
23 whereabouts is insignificant: he did not testify that Mr. Miller criticized him for being at
24 counseling, told him that he should not be at counseling, or prevented him from participating in
25 counseling. See Tambling Depo. Ex. A (Lopez Depo.) at 123:12–17. Mr. Lopez testified only

26
27 ¹⁵ Because Vacaville is closer to Reno than Pittsburg is, the transfer to Vacaville technically even
28 accommodated Mr. Lopez’s characterization of his request in his opposition brief: that WinCo
“remov[e] him from the stressful work environment at the Pittsburg store and bringing him closer
to his support network” in Reno. See Opp’n at 17.

1 that he sometimes had to reschedule sessions because his assistant store managers were not able to
2 be present to provide coverage. Id. at 113:1–10. But WinCo requiring him to schedule his
3 counseling sessions at a time that the store had coverage does not mean that it failed to reasonably
4 accommodate him. In fact, FEHA states in part that “If the employee’s need for leave . . . is
5 foreseeable due to a planned medical treatment or supervision, the employee shall make a
6 reasonable effort to schedule the treatment or supervision to avoid disruption to the operations of
7 the employer.” Cal. Gov. Code § 12945.2(e)(2)(h). Ms. Pingree testified that as far as she knew,
8 WinCo accommodated Mr. Lopez’s request to see a counselor. Tambling Decl. Ex. F (Pingree
9 Depo.) at 99:3–14. The evidence supports that view.

10 **3. FMLA Leave**

11 The third basis that Mr. Lopez lists for his failure to accommodate claim is that WinCo
12 failed to provide FMLA leave. Opp’n at 17. But he includes no argument in support of this basis
13 in his brief, and fails to articulate what a reasonable accommodation would have been. See Opp’n
14 at 17–19 (only including discussion of two desired accommodations: transfer and time off for
15 counseling). It is possible that Mr. Lopez mistakenly referenced FMLA leave in this claim, as he
16 has a separate FMLA interference claim, addressed below. In any case, the evidence demonstrates
17 that WinCo provided Mr. Lopez with the April 26 to May 13, 2019 leave of absence that he
18 requested.

19 Accordingly, the reasonable accommodation claim fails.

20 **C. Failure to Engage Claim**

21 FEHA requires that an employer engage in a “timely, good faith interactive process . . . in
22 response to a request for reasonable accommodation by an employee . . . with a known physical or
23 mental disability of known medical condition.” Cal. Gov. Code § 12940(n).

24 Mr. Lopez argues first that while Ms. Pingree met with him on December 11, 2018, she
25 “foreclosed any meaningful conversation regarding Mr. Lopez’s transfer request to Reno, Tracy,
26 Folsom, or Roseville by falsely stating that Vacaville was the only available accommodation.”
27 Opp’n at 19. “[T]he availability of a reasonable accommodation . . . is necessary” to a failure to
28 engage claim, and “the burden of proving the availability of a reasonable accommodation rests on

1 the employee.” See Nadaf-Rahrov, 166 Cal. App. 4th at 983–84. As discussed above, there was
2 no available store manager position at the time of Mr. Lopez’s request. The first position that
3 became available was in the Vacaville store. Ms. Pingree, who communicated this information to
4 Mr. Lopez and who facilitated his access to counseling sessions by initiating a workers’
5 compensation claim, did not fail to engage.

6 Mr. Lopez further argues that WinCo “ignore[ed] any potential need for further
7 accommodation” when it fired him. Id. at 20. But he has not articulated what reasonable
8 accommodation would have been available at the time of his termination, which is his burden.
9 See Scotch v. Art Institute of Calif., 173 Cal. App. 4th 986, 1018 (2009) (“an employee must
10 identify a reasonable accommodation that would have been available at the time the interactive
11 process should have occurred.”).

12 Accordingly, the failure to engage claim fails.

13 **D. Retaliation Claim**

14 FEHA provides that it is unlawful for any employer to retaliate against an employee for
15 engaging in a protected activity. Cal. Gov. Code § 12940(h). FEHA retaliation claims are
16 analyzed using the McDonnell Douglas burden shifting framework. See Lelaind v. City & Cnty.
17 of San Francisco, 576 F. Supp. 2d 1079, 1094 (N.D. Cal. 2008). To establish a prima facie case of
18 retaliation, Mr. Lopez must show that (1) he was engaged in a protected activity, (2) WinCo took
19 an adverse employment action against him, and (3) a causal connection existed between the
20 protected activity and the adverse employment action. Id. (citing Cornwell v. Electra Cent. Credit
21 Union, 439 F.3d 1018, 1034–35 (9th Cir. 2006)). If Mr. Lopez can establish a prima facie case of
22 retaliation, the burden shifts to WinCo to articulate a legitimate, non-discriminatory reason for its
23 actions. See id. at 1099. If WinCo can do so, then the burden shifts back to Mr. Lopez to show
24 that WinCo’s proffered reason is pretext. Id. at 1100.

25 Mr. Lopez seeks to establish a prima facie case by asserting that he engaged in protected
26 activity when he requested reasonable accommodations on December 10, 2018, and that WinCo
27 retaliated against him for that protected activity when it “transferred him to a problematic store in
28 order to impair Plaintiff’s job performance,” suspended him, and terminated him. See Compl. ¶¶

1 79–81. WinCo does not dispute that Mr. Lopez’s December 10, 2018 email was protected
 2 activity, but challenges the remainder of his prima facie showing.

3 Mr. Lopez cannot establish a prima facie case that his January transfer to the Vacaville
 4 store was retaliation. As discussed above in connection with the disability discrimination claim,
 5 the transfer, at Mr. Lopez’s request and with his consent, was not an adverse employment action.¹⁶
 6 Even if Mr. Lopez had established a prima facie case as to his transfer, as discussed above, WinCo
 7 has articulated a legitimate and non-discriminatory reason for sending him to the Vacaville store—
 8 that Mr. Lopez requested it and consented to it—and Mr. Lopez has not demonstrated that that
 9 reason is pretext.

10 Mr. Lopez’s suspension and termination also fail as bases for the retaliation claim. While
 11 both are adverse employment actions, the evidence that they resulted from the December 10, 2018
 12 email is very weak, as there was a four month gap between the email and the suspension, and a
 13 five month gap between the email and the termination. See Arteaga v. Brink’s, Inc., 163 Cal.
 14 App. 4th 327, 354 (2008) (“[C]ases that accept mere temporal proximity . . . as sufficient evidence
 15 of causality to establish a prima facie case uniformly hold that the temporal proximity must be
 16 very close.”) (internal quotation marks omitted; emphasis in original); see also Shaw v. Abbott
 17 Labs, Inc., No. 17-4783 SS, 2018 WL 4853670, at *19 (C.D. Cal. Aug. 13, 2018) (more than six
 18 month gap between events “is not compelling evidence of ‘proximity’”); Washington v. Cal. City
 19 Corr. Ctr., 871 F. Supp. 2d 1010, 1029 (E.D. Cal. 2012) (3-month gap and 4-month gap have been
 20 held insufficient). In addition, “[e]vidence that the employer had been concerned about a
 21 problem before the employee engaged in the protected activity undercuts the significance of the
 22 temporal proximity.” Day v. Sears Holdings Corp., 930 F. Supp. 2d 1146, 1188 (C.D. Cal. 2013)
 23 (quoting Smith v. Allen Health Sys., Inc., 302 F.3d 827, 834 (8th Cir. 2002)). Here, Mr. Lopez’s
 24

25 ¹⁶ Moreover, the allegation that WinCo transferred Mr. Lopez “in order to impair [his] job
 26 performance” is unsupported. See id. ¶ 51. WinCo has submitted evidence that there was no store
 27 manager opening at the time of Mr. Lopez’s request, see Miller Depo. at 60:19–61:6, 82:23–83:1,
 28 and that the first store manager job that became available was in the Vacaville store, because the
 previous store manager, Mr. Mahle, was terminated, id. at 83:5–10. There is no evidence that
 WinCo engineered the opening at the Vacaville store in order to transfer Mr. Lopez to a troubled
 store and thereby impair his job performance.

written warning from January 2018, which predated his protected activity, highlighted several of the problems cited in his suspension and termination in 2019. See Lopez Depo. Ex. 6.

Even if Mr. Lopez established a prima facie case of retaliation based on his suspension and termination, though, as discussed above in connection with the disability discrimination claim, WinCo has articulated a legitimate, non-discriminatory reason for the suspension and termination—poor job performance—and Mr. Lopez has failed to demonstrate that that reason is pretext. See Vasquez, 349 F.3d at 642 (specific and substantial evidence required for pretext); Arteaga, 163 Cal. App. 4th at 354 (temporal proximity is insufficient to demonstrate pretext).¹⁷

Accordingly, the retaliation claim fails.

E. Failure to Prevent Claim

FEHA makes it unlawful for an employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” Cal. Gov. Code § 12940(k). Mr. Lopez argues that “WinCo discriminated and retaliated against [him]” and therefore “there is a triable issue of fact as to whether it failed to prevent those acts.” See Opp’n at 23. Because Mr. Lopez’s discrimination and retaliation claims fail, the failure to prevent claim also fails. See Lelaind, 576 F. Supp. 2d at 1103 (element of failure to prevent claim is that “plaintiff was subjected to discrimination, harassment or retaliation”).

F. FMLA Interference Claim

Under the FMLA, it is “unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided” in the statute or the implementing regulations. 29 U.S.C. § 2615(a)(1), 29 C.F.R. § 825.220(b). Mr. Lopez argues that WinCo

¹⁷ The only additional evidence of pretext that Mr. Lopez points to in support of his retaliation claim is Mr. Mahle’s assertion that the employee’s son also took pictures of the produce department when Mr. Mahle was store manager but that WinCo did not discipline Mr. Mahle. See Opp’n at 22. This assertion does not demonstrate “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them ‘unworthy of credence,’” see Hersant, 57 Cal. App. 4th at 1005, as the suspension occurred after Mr. Lopez failed to improve his performance as outlined in the January 2018 written warning, and following Mr. Miller’s coaching in connection with the March 17 and 24 photos. See Lopez Depo. Ex. 9 (Suspension Notice recounting employment history including January 2018 written warning, district manager’s having reinforced the expectation of walking the sales floor, March 17 and 24, 2019 incidents, and March 26, 2019 inspection). The photos alone were not the basis for Mr. Lopez’s suspension. Id.

1 interfered with his rights under the FMLA by (1) denying him FMLA leave and (2) using his
 2 request for FMLA leave as a factor in his termination.¹⁸ See Compl. ¶ 101.

3 1. Denying Leave

4 The only time that Mr. Lopez sought FMLA leave during the relevant time period was for
 5 his April 26 to May 13 absence, and WinCo provided him with leave on those dates. He emailed
 6 Mr. Miller and Ms. Pingree on April 27, stating that he would be off of work to attend to his health
 7 until May 13. Pingree Decl. Ex. B. Ms. Pingree responded, “Please be sure to contact FMLA
 8 Source to apply for FMLA protections and notify payroll of your absence so they can process your
 9 pay accordingly. Take care of yourself!” See id.

10 Mr. Lopez concedes that WinCo gave him the time off that he desired, but argues that
 11 WinCo nonetheless denied him FMLA leave. Opp’n at 10 (citing Tambling Decl. Ex. R (FMLA
 12 denial) at C000664). Indeed, the cited document, from May 17, 2019, states “FMLA/STATE
 13 DENIED 4/26/19–5/12/19.” See Tambling Decl. Ex. R (FMLA denial) at C000664. WinCo
 14 asserts that “[t]he only reason this leave was not designated as FMLA leave is because Lopez was
 15 terminated before he was able to submit the necessary documentation, but that is immaterial
 16 because Lopez was provided the leave.” MSJ at 18. Mr. Lopez does not articulate why it is
 17 significant that the leave he was granted was not called FMLA leave. In fact, he does not include
 18 any argument in support of this basis for his FMLA interference claim in his brief whatsoever.
See Opp’n at 24–25 (arguing only that WinCo retaliated against him for taking leave). Asked
 19 about this issue at the motion hearing, Mr. Lopez conceded that he was granted FMLA leave even
 20 though it was not so designated. As WinCo did not interfere with Mr. Lopez’s right to take leave,
 21

22
 23 ¹⁸ Mr. Lopez uses the word “retaliation” in connection with this claim, see id., Opp’n at 15 (“he
 24 was retaliated against for requesting FMLA leave.”), 24 (“There is a Triable Issue of Fact as to
 25 Whether WinCo Interfered with Mr. Lopez’s Rights under the FMLA or Retaliated Against Mr.
 26 Lopez for Requesting FMLA [L]eave.”). The Ninth Circuit, though, has held that it is error to
 27 apply the McDonnell Douglas burden shifting test to a claim that taking FMLA-qualified leave
 28 influenced a decision to terminate an employee, and that only when the claim involves an
 employee being punished for opposing unlawful practices is the issue one of retaliation. See Xin
Liu v. Amway Corp., 347 F.3d 1125, 1136 (9th Cir. 2003). This Court therefore uses the Circuit’s
 prescribed language and analysis. See Sutton v. DeRosia, No. 1:11-CV-01426-LJO-JLT, 2012
 WL 4863788, at *9 (E.D. Cal. Oct. 12, 2012) (“Although plaintiff labels her claim as a retaliation
 claim, it is actually an interference claim.”).

1 this basis for the claim fails.

2 **2. Using Leave as a Factor in Termination**

3 Nor has Mr. Lopez raised a triable issue of fact as to whether WinCo used Mr. Lopez's
4 leave as a factor in his termination. “[A]n employee may prevail on a claim that an employer
5 interfered with [his] rights by terminating [him] in violation of FMLA by showing, by a
6 preponderance of the evidence[,] that [his] taking of FMLA-protected leave constituted a negative
7 factor in the decision to terminate [him].” Xin Liu, 347 F.3d at 1135–36. Mr. Lopez claims to
8 have met this burden, citing Xin Liu for the proposition that “[W]here an employee is subjected to
9 ‘negative consequences . . . simply because he has used FMLA leave,’ the employer has interfered
10 with the employee’s rights.” Opp’n at 24 (citing Xin Liu, 347 F.3d at 1135–36).

11 But Mr. Lopez was not terminated “simply” for taking FMLA leave. The only evidence of
12 causation that Mr. Lopez points to is that WinCo terminated him just fifteen days after he
13 requested leave. Opp’n at 24–25 (“[t]he timing alone is compelling evidence that WinCo’s actions
14 were retaliatory.”). But “[e]vidence that the employer had been concerned about a problem before
15 the employee engaged in the protected activity undercuts the significance of the temporal
16 proximity.” See Day, 930 F. Supp. 2d at 1188 (in the context of FEHA claim). Here, following
17 progressively severe disciplinary action, see Lopez Ex. 6 (written warning); Miller Depo. at
18 114:9–14. (“We’ve got to get this fixed. This shouldn’t be happening.”); Miller Depo. Ex. 9
19 (Notice of Disciplinary Suspension), Mr. Lopez’s store was the subject of an inspection on April
20, and that inspection had not gone well. See Miller Depo. Ex. 23 (“unacceptable”; “not
21 presentable”; “disturbing”; “atrocious”). Mr. Lopez had not yet been disciplined for the April 20
22 inspection at the time he took leave.

23 WinCo was not required to withhold discipline because Mr. Lopez took leave. See
24 Fleming v. IASIS Healthcare Corp., 151 F. Supp. 3d 1043, 1055 (D. Ariz. 2015) (rule that timing
25 alone would create a triable issue of fact on this issue “would place employers in a dilemma as to
26 any unsatisfactory employee who requests leave: either keep him or face trial. The FMLA does
27 not impose this Hobson’s choice.”). And Mr. Lopez was not entitled to stay in his position simply
28 because he took leave. See 29 U.S.C. § 2614(a)(3)(B) (FMLA does not entitle employees to “any

1 right, benefit, or position of employment other than any right, benefit, or position to which the
2 employee would have been entitled had the employee not taken leave.”).

3 Mr. Lopez has not demonstrated by a preponderance of the evidence that WinCo used his
4 leave as a negative factor in the decision to terminate him. See Xin Liu, 347 F.3d at 1136. To the
5 contrary, the evidence demonstrates that WinCo decided to terminate him when he returned from
6 leave because of continued poor performance.¹⁹ Accordingly, this basis for the FMLA
7 interference claim also fails.

8 **G. Punitive Damages**

9 Mr. Lopez’s complaint alleges repeatedly that WinCo acted “oppressively and maliciously,
10 with the wrongful intention of injuring Plaintiff, from an evil and improper motive amounting to
11 malice,” entitling Mr. Lopez to punitive damages. See, e.g., Compl. ¶¶ 55, 65. In his opposition
12 brief, Mr. Lopez argues that the basis for his request for punitive damages is that “WinCo, a
13 corporate giant of the grocery industry, discriminated and retaliated against Mr. Lopez, a long-
14 term employee, after he made his work related disabilities known and requested
15 accommodations.” Opp’n at 25. Because this Court concludes that WinCo did not violate Mr.
16 Lopez’s rights, it also concludes that Mr. Lopez is not entitled to punitive damages.

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Court GRANTS WinCo’s motion.

19 **IT IS SO ORDERED.**

20 Dated: August 25, 2021



21 CHARLES R. BREYER
22 United States District Judge

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24
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26
27 ¹⁹ Mr. Lopez also testified that he had applied for and been granted FMLA leave in the past, Lopez
28 Depo. at 44:16–25, 177:9–11, which further undermines the notion that his leave played any role
in his termination.